Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

MICHAEL P. KELLY, JOHN T. KELLY,
Cross-Petitioners,

v.

DIONNE STAPLES,
and the Secretary, United States Department of Housing & Urban Development,
Respondent.

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a government agency retains jurisdiction when it has completely neglected a case by its failure to timely comply with the Fair Housing Act as amended in 1988, 42 U.S.C. 3602 et. seq. concerning notice of complaint, investigation, conciliation and issuance of probable cause as required by law and violates the due process rights guaranteed to citizens by failure to provide notice in compliance with law and thereby renders its orders invalid.

2. Whether a citizen who compels a government agency to comply with the law, comply with agency regulations, secures due process rights envisioned by Congress and exposes fraudulent conduct of a government agency is a prevailing party.

PARTIES TO THE PROCEEDING

Cross-Petitioners Michael P. Kelly and John T. Kelly are individuals.

Cross-Respondent Dionne Staples is an individual.

Respondent Secretary of Housing and Urban Development is an agency of the United States government.

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Michael P. Kelly and John T. Kelly (Kellys) respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in Kelly v. Secretary of Housing and Urban Development, and Dionne Staples, 97 F.3d 118 (6th Cir. 1996).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 97 F.3d 188 and is reprinted in the appendix to Petitioner's petition for writ of certiorari, Case No. 96-1712 [hereinafter "Petitioner. App."] at pp. A-1 to A-16. The Initial Decision on Remand of the Administrative Law Judge of the Department of Housing and Urban Development is reprinted in Case No. 96-1712 at Petitioner. App. D87 to D108. A prior decision of the Court of Appeals for the Sixth Circuit, 3 F.3d 951 (6th Cir. 1993) is reproduced at Petitioner. App. B17 to B33. The Initial Decision of the Administrative Law Judge of the Department of Housing and Urban Development is reprinted in Case No. 96-1712 at Petitioner. App. C34 to C86. The Initial Decision and Order on Applications for Attorney's Fees in Case No. 96-1712 at Respondents' Appendix (Res. App. A).

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals issued its decision and judgment herein on September 30, 1996. Timely petitions for rehearing and rehearing en banc were filed by Cross Respondent/Petitioner Staples and Respondent, Secretary of Housing and Urban Development which were denied by the Sixth Circuit on January 24, 1997.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1) and Rule 12.5 of the Rules of the Supreme Court of the United States and is conditional upon this Court's grant of Petitioner's petition for writ of certiorari docketed April 28, 1997.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the Fair Housing Act as amended, 1988, 42 U.S.C. §§3601-19 and 24 CFR 103.1 through and including 24 CFR 104.590. Selected portions of 42 U.S.C. are reproduced and included in Case No. 96-1712 (Respondents' App. E). Selected portions of 24 CFR are reproduced and included in Case No. 96-1712 (Respondents' App. F).

STATEMENT OF THE CASE

Respondents Michael P. Kelly and John T. Kelly respectfully oppose Staples' petition for a writ of certiorari. The petition is an exercise in creative writing that is short on facts and long on emotion. Respondents are compelled to set forth the facts as Petitioner's is inaccurate.

FACTS:

The Petitioner allegedly made a phone call on March 5, 1990, to inquire about the availability of an apartment. Petitioner never viewed the apartment or went to the apartment and does not know with whom she spoke. Petitioner's sole observation of the apartment was from a bus window. Petitioner perceived that she was denied the apartment after a short phone conversation. Petitioner sought the assistance of Housing Opportunities Made Equal, Inc. (HOME), a local fair housing agency. The individual from HOME limited her investigation to asking Petitioner with whom she spoke. Based on the foregoing, HOME filed a complaint on behalf of Staples with HUD on May 19, 1990, that was filled with incorrect information.

HUD received the Staples complaint and sent it to an investigator, Charles Jung, who is assigned to HUD's Cincinnati office. This administrative assignment compounded HOME's error ridden complaint and commenced a series of violations by HUD of its own regulations, the Fair Housing Act, the criminal code and due process rights of Michael P. Kelly and John T. Kelly.[1] The full extent of HUD's noncompliance with the Fair Housing Act and the

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[1] James Wm. Kelly who was initially named as a discriminator in the second amended complaint filed November 1990 was never served with a complaint or contacted by Jung and was dismissed by the Administrative Law Judge as a party.

incompetence of HUD in dealing with Michael P. Kelly and John T. Kelly undermined every procedural safeguard in the Fair Housing Act, Congressional intent in the administration of the Fair Housing Act and deprived HUD of jurisdiction of the complaint.

HUD AND INVESTIGATOR JUNG:

A. **Service of Complaints**

HUD served Respondent Michael P. Kelly with the initial complaint at Michael P. Kelly Realty but never served the amended complaint or second amended complaint on him. John T. Kelly was never served with the initial complaint, amended complaint or the second amended complaint in compliance with the Fair Housing Act or HUD regulations. The second amended complaint was never served on James Wm. Kelly, who was alleged to be a discriminator, but he was subsequently dismissed as a party. In fact, the second amended complaint naming James Wm. Kelly as a discriminator was filed one month after Jung completed his investigation in this matter.

Jung never contacted Respondent Michael P. Kelly by phone or in person during the course of his investigation. Respondent Michael P. Kelly contacted Jung once concerning the complaint. While allegedly investigating the Staples' complaint, Jung arranged conciliation where Jung served as investigator and conciliator in violation of HUD regulations. Respondent Michael P. Kelly, Dionne Staples and representatives from HOME attended the conciliation. Respondent John T. Kelly attended the conciliation session with his brother Michael, but John T. Kelly was not aware that he was named as a discriminator at the time of the meeting and never received notice that he was named in a

complaint until August 1990.[2]

At the conclusion of the July 1990 conciliation meeting, Jung took the information provided in conciliation, that Jung never verified, and filed an amended complaint against Michael P. Kelly and John T. Kelly. Jung's use of information obtained in conciliation to file an amended complaint is in violation of HUD regulations and the Fair Housing Act. The notice of the filing of the amended complaint served by Jung on John T. Kelly did not meet the minimal requirements required by the Fair Housing Act concerning conciliation and the rights of the purported discriminator. Jung never served Michael P. Kelly with the first amended complaint.

When John T. Kelly received the amended complaint approximately two weeks after conciliation, he decided Jung was either incompetent or dishonest or both. John T. Kelly's impression of Jung proved accurate. John T. Kelly sent a response to HUD's Chicago Regional Office bypassing Jung. Jung failed to investigate any of the Staples' complaints in compliance with the Fair Housing Act, and under the guise of conciliation, used the information obtained in conciliation against the Kellys. It was obvious Jung could not be trusted, and the level of his incompetence is demonstrated in his trial testimony and observations of the Administrative Law Judge.

Jung never attempted to determine if service was made on Michael P. Kelly or John T. Kelly in compliance with the Fair Housing Act or HUD regulations even though he was the assigned investigator, because he alleged at trial it was not his job. Jung never spoke to any of HOME's testers during the

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[2] John T. Kelly was a co-owner of the apartment building in question and attended the conciliation at Michael P. Kelly's request. Petitioner makes reference to conciliation attempts by Jung (Petitioner's Appendix H 137-140), but John T. Kelly was not even served or notified of the complaint against him or his right to conciliation until August 1990.

course of his investigation. Jung spent a total of 20-25 minutes with Staples concerning her original complaint and two amended complaints which he testified at trial to being his normal investigative technique. Jung uses the local building or health code to determine a violation of the Fair Housing Act concerning familial status discrimination, but he does not have a complete copy of the local Cincinnati Basic Building Code relevant to the subject property. Jung has no idea of the responsibilities of property owners and believes the owner could be issued a condemnation order if the Building Code is violated, however he doesn't know what a condemnation order is.

Staples doesn't know with whom she spoke on March 5, 1990, and Jung never bothered to find out. Both HOME and Jung testified that it is important to determine who the complainant spoke to on March 5, 1990, but neither HOME nor Jung attempted to determine the identify of the individual. None of the witnesses could identify Michael P. Kelly or John T. Kelly as the individual who refused to rent, deal or negotiate for the rental of 6300 Montgomery Road.

The Kellys responded to Jung's request for information in September 1990, but they could not deal with him, because, due to his actions after conciliation, they believed him to be incompetent and deceitful. Jung completed his investigation on October 2, 1990. Jung didn't tell the Kellys the investigation was completed and, in fact, did not contact the Kellys after September 1990. The Kellys never received any correspondence concerning Staples' complaint after September 1990 from HUD or anyone else until March 1992. Staples wasn't contacted by HUD from October 2, 1990 until March 1992.

THE REASONABLE CAUSE DETERMINATION:[3]

HUD served the reasonable cause determination on Michael P. Kelley and James Wm. Kelly at 2147 St. James Place, Cincinnati, Ohio.[4] After two years, HUD still couldn't serve documents in compliance with the Fair Housing Act or even spell the parties' names correctly. Subsequent attempts at service eventually reached Michael P. Kelly and John T. Kelly. Answers were filed on behalf of Michael P. Kelly (Respondents' App. G) and John T. Kelly (Respondents' App. G). Respondents Michael P. Kelly and John T. Kelly conducted discovery and filed Motions to Dismiss (Respondents' App. H). The Motions to dismiss were overruled. (Respondents' App. H)

Respondents attempted to subpoena Jung's superiors to testify concerning Jung's actions and HUD's compliance with its regulations and the Fair Housing Act. The agency's Administrative Law Judge quashed the request for subpoenas and spared Jung's superiors from cross-examination.

THE TRIAL:

The trial was remarkable as not one witness could identify Michael P. Kelly or John T. Kelly as the individual who spoke to Staples. Jung was exposed as an incompetent who repeatedly violated the Fair Housing Act and HUD regulations at the expense of Respondents' rights. HUD trial counsel was exposed for answering and signing

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[3] Neither the Kellys nor Staples were represented by counsel prior to the issuance of the reasonable cause determination. Morgan served as general counsel for HOME during all or a portion of these proceedings.

[4] Ironically, although Michael, John and James Kelly are brothers, HUD added an extra "e" to Michael and John's last name while spelling James' last name with one "e."

interrogatories under oath that Jung purportedly answered but in fact never saw until trial. Against this backdrop of HUD duplicity and incompetence, the Administrative Law Judge held that the liability finding in this case was not based on Jung's credibility. Even the Administrative Law Judge found Jung, his investigation and HUD's handling of the complaints completely unreliable and incredulous.

The Kellys presented testimony that they rented to families with two children before the Fair Housing Act was enacted and after it was amended in 1988. The Kellys testified that they attempted to comply with the local occupancy code. The code enforcement official and the Director of Buildings and Inspections of Cincinnati both testified that occupancy laws are enforced. Nonetheless, the Administrative Law Judge ruled in favor of Staples and ordered a damage award and a plethora of enforcement mechanisms for which there is no justification in the record.[5]

THE FIRST APPEAL:

The Kellys appealed and Staples cross appealed, and the case proceeded to the Sixth Circuit. The Kellys believed the decision of the Administrative Law Judge was erroneous and Staples wanted more money. As Judge Lively stated at oral argument, the Sixth Circuit had to bail HUD out again. The Kellys' due process rights were dashed at the expense of protecting HUD. The Sixth Circuit vacated the damage award with the instruction that damages shall not be assessed during the period the case was completely neglected by HUD. The case was remanded with instructions not to award damages for the period of time HUD completely neglected the case and that the parties should attempt conciliation with a

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[5] Petitioner's brief makes a reference to race discrimination, however, Ms. Staples testified that both Jung and HOME informed her there was no basis for the race complaint.

competent, unbiased conciliator.[6]

INITIAL DECISION ON REMAND:

The remand of the case to the same Administrative Law Judge was an exercise in futility based upon the issuance of the Administrative Law Judge's order (Respondents' App. D). It was soon apparent that any submission to the Administrative Law Judge was strictly a formality, because the Administrative Law Judge's order in response to the Sixth Circuit's decision forecast exactly what the Administrative Law Judge's decision would be on remand. After finding that Jung lacked credibility, that HUD counsel had filed false interrogatories under oath and that HUD was indifferent to the Fair Housing Act, the Administrative Law Judge found that there was no period of complete neglect. Essentially the Administrative Law Judge found that even though the case was built on quicksand, HUD dispatched its duties, and the award was reduced by One Dollar, required payment of interest and extended reporting requirements. The decision amounted little more than vendetta justice.

THE ATTORNEY FEES:

Upon receipt of the initial decision on remand, Staples' counsel filed a petition for fees. The Kellys' counsel also filed a petition for fees. The Administrative Law Judge awarded fees to Staples' counsel in the sum of Thirty Thousand Six Hundred Fifty-two and 46/100 Dollars ($30,652.46)(Respondent's App. A). The Kellys' fee petition

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[6] Conciliation after the decision on the first appeal to the Sixth Circuit was an exercise in futility, as the demands were exorbitant, and the HUD conciliators were ineffectual five years after the date conciliation should have occurred.

was denied.[7] Neither Staples' counsel nor Kellys' counsel was involved in this case until after the Probable Cause Determination was issued in March 1992 or twenty-one months after the case was required to be concluded. The appearance of counsel was after the twelve-month period in the Court's decision in Kelly II.

THE SECOND APPEAL:

On appeal, the Sixth Circuit reduced Staples' damage award rather than finding that HUD completely neglected the case from Day One and lacked jurisdiction. Rather than address the due process violations and HUD's complete neglect and enforce the law as written, the Court gave Staples a compensatory damage award, an award of attorney fees almost seven times what Staples received and awarded the Kellys $20,000.00 in fees and expenses for the pursuit of their appeal rights before an agency that would not comply with its own regulations and rules; that persistently and repeatedly attempted to circumvent justice; that adamantly displayed a cavalier attitude toward the due process rights of the Kellys; that, with feckless abandon, attempted to exacerbate damages and alienate the parties; and that, even in the world of bureaucratic red tape, elevated the definition of "complete neglect" to a new high. HUD was an agency run amok.[8]

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[7] Although Judge Ryan stated in his dissent that the Kellys did not file a fee petition, it was included in the joint appendix and in the record filed with the Sixth Circuit.

[8] Kellys offered payment to Staples and notified Morgan that arrangements were being made to pay his fees. Morgan never responded to the Kellys' offer of payment. Delay in payment does not lie with the Kellys but with the nonresponse by Petitioner's counsel to assert an emotional appeal that everyone is paid except Staples and Morgan.

REASONS FOR GRANTING THE WRIT:

I. Whether a government agency retains jurisdiction when it has completely neglected a case by its failure to timely comply with the Fair Housing Act as amended in 1988, 42 U.S.C. 3601 et. seq., concerning notice of complaint, investigation, conciliation and issuance of probable cause as required by law and violates the due process rights guaranteed to citizens by failure to provide notice in compliance with law and thereby renders it orders invalid.

This case presents the Court with a governmental agency that is absolutely indifferent to federal law it is required to enforce, duplicitous with the Courts and contemptuous of the rights of citizens. Upon initial review by the Sixth Circuit in Kelly v. Secretary, HUD, 3 F.3d 951 (6th Cir. 1993) (Kelly I), the Court ruled that in no case should damages be assessed for the period during which HUD completely neglected this case. This proceeding involves a Housing of Urban Development Administrative Law Judge's indifference to a Court mandate, knowing disregard by HUD of the Fair Housing Act, 42 U.S.C. 3601 et. seq., and the intentional submission of false affidavits by HUD in violation of federal law to various Courts. The issue of the determination of complete neglect dates to the assignment of this case to HUD and not by an artificially created twelve-

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Further, Petitioner alleges this case languished in the Sixth Circuit when in fact the Court had three appeals before it: (1) Kellys' appeal, (2) Petitioner's appeal of One Dollar reduction in damages, and (3) The issue of attorney fees. All appeals were consolidated in one decision. Petitoner's counsel also failed to mention his request to extend time to file Petitioner's brief.

month period when this case was to be completed.

In Secretary, HUD, on behalf of Herron v. Blackwell, 908 F.2d 864, 869 (11th Cir. 1990), the Court discussed at length the amendments to the Fair Housing Act passed in 1988. The amendments created elaborate enforcement mechanisms that were totally neglected by HUD in the instant case. The issue in this case is: When did HUD deal with this case in conformity with law and its regulation and thereby not totally neglect the case? The answer is NEVER!

The authority and responsibility for administering the Fair Housing Act is assigned to the Secretary of Housing and Urban Development (Secretary). 42 U.S.C. 3608(a). The Secretary may delegate any of his functions, duties and powers to employees of the Department of Housing and Urban Development. 42 U.S.C. 3608(c). The individuals selected shall administer their programs and activities in a manner affirmatively to further the purposes of the Act. 42 U.S.C. 3608(d) (emphasis supplied). In the instant case, the individuals selected to further the purposes of the Act were Charles Jung, the HUD investigator, Konrad Rayford, trial attorney for HUD in this proceeding, the Administrative Law Judge and the United States Department of Justice.

The Secretary is required by law and its regulations to provide to the named respondent within ten days after the filing of a complaint a notice identifying the alleged discriminatory housing practice and advise such respondent of his procedural rights and obligations, together with a copy of the original complaint. 42 U.S.C. 3610(a)(B)(ii) and 24 CFR 103.50. In the instant case, the Secretary and Charles Jung failed to serve John T. Kelly with a copy of the initial complaint, first amended complaint, second amended complaint or with information concerning his procedural rights and obligations under the Act as required. The terminology used in the Act is unambiguous: ". . . the Secretary shall . . .". This is a command and not permissive.

42 U.S.C. 3610(a)(B)(ii). Within ten days of the filing of the complaint HUD was not following the law and thereby totally neglecting the case.

The Secretary is mandated to make an investigation of the alleged discriminatory housing practice and complete the investigation within one hundred days of the filing of the complaint (or last filed amended complaint naming an additional respondent) unless it is impracticable to do so. 42 U.S.C. 3610(a)(B)(iv) and 24 CFR 103.225. Further, if the Secretary is unable to complete the investigation within one hundred days after the filing of the complaint (or last filed amended complaint naming an additional respondent), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so. 42 U.S.C. 3610(a)(C). In the instant case, no notices were sent that the investigation was complete or notifying the Kellys of any reason for the delay.[9] This is another instance of HUD's failure to comply with the law and total neglect of the case.

It is incumbent upon the Secretary within 100 days after the filing of the complaint to determine, based on the facts, whether reasonable cause exists to believe a

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[9] Charles Jung testified at trial that he completed his investigation on October 2, 1990. Jung's final investigation report reflects that Dionne Staples signed a second amended complaint on November 5, 1990, and James Kelly and all other named respondents were notified of the second amended complaint on November 5, 1990. Charles Jung sent the second amended complaint to James Kelly, 2147 St. James Avenue, Cincinnati, Ohio 45206, where James Kelly does not reside and has never resided. Further, Charles Jung testified that neither Michael P. Kelly nor John T. Kelly were served with the second amended complaint. Jung completed his investigation on October 2, 1990, according to his trial testimony, but his investigation report contains information after October 2, 1990. Jung's investigation was completed prior to one of the parties even being served, but Jung through some psychic insight knew he would serve the complaint thirty-four days later.

discriminatory housing practice has occurred, unless it is impractical to do so. In the event the Secretary determines it is impractical to timely issue a determination of reasonable cause, written notification of the reasons for not doing so must be sent to the complainant and respondent. 42 U.S.C. 3610(g) and 24 CFR 103.400. The undisputed evidence in this case reflects that the determination of reasonable cause was not accomplished until March 2, 1992. The time period for filing a probable cause determination is 100 days from the filing of the complaint or last amended complaint. The complaint filed November 5, 1990 was the last filed complaint, although HUD did not notify any parties. No extensions were sought by HUD claiming impracticality to complete the investigation at any time. The affidavit of Robert R. Bouchard in Petitioner's, Appendix Case No. 96-1712, at pp. H 145-146 states letters were sent to Kelly Realty, who is not a party, M. Kelly, who was served at 2147 St. James Place, Cincinnati, Ohio, and is not the same M. Kelly as Cross-Respondent, and D. Kelly. Bouchard's affidavit submitted to the Administrative Law Judge on remand of the case by the Sixth Circuit in Kelly I is fraudulent or trial counsel deliberately made a misrepresentation to the Administrative Law Judge at trial, and the appellate attorneys for HUD made a misrepresentation to the Sixth Circuit when it acknowledged HUD didn't comply with the law concerning issuance of notices of impracticability.

Evidently depending on the forum HUD is proceeding, it produces the evidence it deems necessary to substantiate its case regardless of its authenticity or veracity. Conveniently after two separate representations in Court proceedings, HUD is able to generate a self-serving affidavit to show compliance with the law. Bouchard's affidavit does not have the notice allegedly sent attached or to whom it was addressed. Bouchard was good enough to send a notice to D. Kelly, and

there is no D. Kelly involved in the case.

The actions of HUD and the investigator go beyond any semblance of compliance with the Fair Housing Act, and the actions standing alone demonstrate the lack of jurisdiction, the substantial prejudice to the Kellys by the denial of service, denial of objectively reasonable conciliation, denial of an objectively reasonable investigation, failure to serve a probable cause determination within 100 days, incompetence, and conduct that, if not criminal, is a manipulation of the justice system. Congressional mandates concerning jurisdiction and the Kellys' due process rights regarding notice and statutory entitlements were disregarded by HUD to the extent of filing false affidavits or making false representations to the Court.

The transcript in this proceeding containing Mr. Jung's testimony reflects that his investigations are "conducted in accordance with the law and Fair Housing Act," as he understands it. Jung, while serving as investigator on this complaint, conducts a conciliation in violation of HUD regulations serving as investigator and conciliator. 24 CFR 103.300(c). Unable to resolve the case, Jung uses information obtained during the conciliation to file an amended complaint in direct contravention of the law. 24 CFR 103.330(a). The trial record reflects that it is Jung's responsibility as the investigator "to make sure the initial complaint is served" although he never did. The list of transgressions of the law by the investigator and HUD is so lengthy and the incompetency so glaring it cannot be limited to 30 pages. I feel compelled to request the Court to read the cross examination of Mr. Jung to determine if his cavalier attitude toward Congressional acts, Congressional intent and judicial rulings comports with jurisdictional requirements or due process. HUD and Jung's conduct demonstrates the process inflicted on the Kellys by HUD was unfair and inequitable and failed to comply with the law. Jung's cross

examination clearly demonstrates that he completely neglected this case from day one with the assistance of the error ridden complaint prepared by H.O.M.E.

While the Administrative Law Judge clearly recognized that "egregious" errors by the government produces erosion of public confidence, the Administrative Law Judge ignored the total neglect of his agency. Jung's incompetence and total neglect coupled with his superior's lack of oversight collectively and substantially prejudiced Michael P. Kelly and John T. Kelly by denying them any procedural safeguards of an objectively reasonable conciliation or an objectively reasonable investigation, as contemplated by Congress. HUD was hard pressed to deny the various failures at trial and before the Sixth Circuit at the first appeal in Kelly I to comply with statutory requirements and its own regulations. Even the Administrative Law Judge stated at the conclusion of the trial of the case that the accumulation of errors on the government's part has the cumulative effect to undermine the effectiveness of government and to undermine the public's trust in government but nailed the Kellys. The Administrative Law Judge's own observations bolster and substantiate that HUD totally neglected the case. On remand before the Administrative Law Judge, HUD officials submitted affidavits that are at best self-serving and untrue. The Administrative Law Judge did not take his agency to task on the false affidavits but rather ignored the duplicity.

The foregoing are instances of the outright violation of the Fair Housing Act, and the Code of Federal Regulations by the Secretary or his representatives in the enforcement of the Act at the earliest stages and throughout these proceedings. The combination of the deficiencies and violations far exceed any witnessed by this Court or in any reported decision. In the instant case, HUD lacked jurisdiction because it didn't serve the complaint in accord

with the Act or Regulations and distorted the investigatory process by completing an investigation prior to service of the complaint on a named party. Further, HUD's failure to issue a probable cause determination and complete its investigation within 100 days would lead any reasonable person to believe the complaint was dismissed because the law requires the completion of the investigation and issuance of a probable cause determination within 100 days, not two years. HUD's failure to comply with Congressional mandates in this case are troubling for any citizen and demonstrate a period of complete neglect. Congress provided a timetable for investigations and determination of probable cause of 100 days and even permitted extensions if the completion of the task was not practical provided there was notice.

HUD could not have entertained Ms. Staples' complaint if it was filed after March 5, 1991 due to the one-year statute of limitations. 42 U.S.C. 3610(a)(1)(A)(i). Although timely filed, HUD did not comply with statutory requirements, totally neglected the complaint and thus the claim should be barred. Who better than HUD understands the various permutations and requirements of the Act since it is charged with its enforcement? The Act should not be used as a sword by HUD and as a shield to hide behind when it fails to comply. This Court must require HUD to follow the law.

The tired and hackneyed excuse advanced by HUD that it is not possible to comply because its caseload has increased was addressed by Congress by permitting HUD to obtain extensions for investigations and determinations of probable cause, provided notification is sent to the parties involved. The House Report on the Fair Housing Amendments Act of 1988 states:

> . . . These notice requirements underscore the roles to be played by HUD in the administrative process. Both the aggrieved

> person and the respondent may rely on HUD for information and advice . . .

House Report at p. 33. Further, Senator Specter specifically stated that the amendments of 1988 provide for an expeditious enforcement proceeding. Congressional Record, Vol. 134, Part 14, Page 19716. Additionally, Congressman Fish specifically stated that both Complainants and Respondents are guaranteed due process rights. Congressional Record, Vol. 134, Part 15, Page 20918.

Congress clearly intended that HUD would play a role in the administrative process and not a dilatory role that obstructed the intent of Congress. The respect for the due process rights of the aggrieved person and the respondent mandated by Congress in the HUD administrative process is clear. HUD is not empowered to obstruct due process rights by ignoring Congressional mandate. Practical concerns of limited resources cannot justify HUD's actions.

The Kellys made two separate attempts to dismiss the action. The first attempt was a pretrial motion before the Administrative Law Judge that was denied. (Respondents' App. H). The second motion to dismiss was at the conclusion of the government case. Jurisdictionally, the first motion should have been granted and for evidentiary reasons, the motion at the conclusion of the government's case should have been granted. HUD is not to be accorded any deference or its interpretation of regulations given controlling weight when it is plainly erroneous or inconsistent with the law or regulation. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

All the Kellys request is that this Court fulfill its duty to enforce an agency regulation mandated by federal law. Bridges v. Wixon, 326 U.S. 135, 152-153. In this case, Congress required HUD to adopt certain procedures. To assume that an agency can formalize procedures and then

ignore same is ludicrous. Unfortunately, that is precisely what HUD did in this case. Agency action taken without observance of procedure required by law and in violation of agency regulations requires invalidation. United States v. Caceres, 440 U.S. 471, 753 and 754 (1979).

The Kellys have argued since day one the courts must examine the legislative history and determine that the words of the Fair Housing Act are not ambiguous. Mohasco Corp. v. Silver, 447 U.S. 807, 818 (1980). The Sixth Circuit that altered the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction. Id. at 826. It is quite clear from the legislative history of the Fair Housing Act that Congress set in place a procedure for the processing of complaints, and HUD's indifference to time deadlines is done at the agency's peril. Since HUD had no jurisdiction, all decisions concerning this matter should be reversed and the case dismissed. HUD must pay for its duplicity that vanquished the rights of the Kellys and the rights of Staples.

II. Whether a citizen who compels a government agency to comply with the law, comply with agency regulations, secures due process rights envisioned by Congress and exposes fraudulent conduct of a government agency is a prevailing party.

The Kellys are prevailing parties pursuant to 42 U.S.C. Section 3612(p) and are entitled to a fully compensatory award of fees. The Administrative Law Judge's decision concerning fees is best summed up in a footnote inserted in his decision that refers to the Kellys' complaints as niggling. (Res. App. A). Quite simply, if HUD was as niggling about the law and its regulations, the Kellys would not be required to expend such an exorbitant sum to protect their rights and others similarly situated. The

Administrative Law Judge had a *winken, blinken* and *nod* attitude towards HUD's incompetence and lawlessness and to the Kellys' due process rights throughout this process.

The only party that did not prevail in this unique case was HUD. The Kellys did not have an attorney until two years after the purported discriminatory act. Consistent with the Sixth Circuit's decision, the Kellys were entitled to the legal fees and costs to defend this action and require HUD to comply with the law. Further, the U.S. should pay both Staples' and Kellys' fees as Staples did not have legal representation until April 1992. The law requires that the agency be liable. 42 U.S.C. Section 3612(p). As the Kellys pointed out in their motions to dismiss, due process required the intervention of the Administrative Law Judge to halt the abuse of the Kellys' due process rights. When the Administrative Law Judge was informed that "HUD is absolutely out of control, and the failure of this tribunal to intervene will cause this Respondent's damages to grow", the Administrative Law Judge ignored the Kellys and permitted their damages to escalate at a geometric rate or capitulate to his agency.

CONCLUSION

HUD's conduct is clearly contrary to law, and the period of twelve months is not even mentioned in the statute. A lawless, deceptive and incompetent government agency should not be protected by the Courts but rather condemned. This Court should grant the writ of certiorari.

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Supreme Court, U.S.
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Nos. 96-1712 and 96-1915

In the Supreme Court of the United States

OCTOBER TERM, 1996

DIONNE STAPLES, PETITIONER

v.

MICHAEL P. KELLY, ET AL.

MICHAEL P. KELLY, ET AL., CONDITIONAL CROSS-PETITIONERS

v.

DIONNE STAPLES, ET AL.

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

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QUESTION PRESENTED

Whether a court may reduce the amount of actual damages awarded to the victim of housing discrimination in violation of the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, on the ground that delay in the federal administrative processing of the complaint compounded the damages.

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BRIEF FOR THE SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16[1]) is reported at 97 F.3d 118. An earlier decision of the court of appeals (Pet. App. B17-B33) remanding the case for further proceedings is reported at 3 F.3d

[1] Citations to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 96-1712.

951. The initial decision of the administrative law judge, United States Department of Housing and Urban Development (ALJ) (Pet. App. C34-C86), and the initial decision of the ALJ on remand (Pet. App. D87-D107) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1996. Petitions for rehearing were denied on January 24, 1997. Pet. App. E109-E110. The petition for a writ of certiorari in No. 96-1712 was filed on April 24, 1997, and placed on the docket on April 28, 1997. The conditional cross-petition for a writ of certiorari in No. 96-1915 was filed on May 28, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. a. In March 1990, petitioner, Dionne Staples,[2] a single mother of twin daughters, inquired about renting a two-bedroom apartment in a complex owned by respondents Michael P. Kelly and John T. Kelly, and their sister-in-law. Pet. App. B18-B19. Petitioner was told by someone from the realty office of respondent Michael P. Kelly that only one child was allowed per bedroom. *Id.* at B18. Respondents later rented the apartment to a couple with no children. *Id.* at B19. Petitioner ultimately rented an apartment in a different location that was less convenient to public trans-

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[2] We use "petitioner" to refer to Dionne Staples who is petitioner in No. 96-1712 and respondent in No. 96-1915. We use "respondents" to refer to Michael P. Kelly and John T. Kelly who are respondents in No. 96-1712 and conditional cross-petitioners in No. 96-1915. The Secretary, United States Department of Housing and Urban Development, is a respondent in both matters and is referred to as "HUD."

portation, to her family, to a grocery store, to a drug store, and to a library and parks. *Id.* at B18-19. Consequently, petitioner's commute to work was longer, costlier, and more complicated, and she had to rely on borrowed cars for transportation on the weekends. *Id.* at C39.

b. After her conversation with an individual in respondent's realty office, petitioner contacted a fair-housing organization which investigated respondents' apartment complex by using testers posing as prospective tenants and confirmed that respondents had a policy of permitting only one child per bedroom. Pet. App. B19-B20. On May 17, 1990, petitioner filed a complaint with the United States Department of Housing and Urban Development (HUD), alleging that she had been denied an apartment by respondents because of her familial status, in violation of the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*[3] Pet. App.

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[3] The prohibition against familial status was added to the FHA through the Fair Housing Amendments Act of 1988 (1988 Amendments), Pub. L. No. 100-430, 102 Stat. 1619. As amended, the FHA makes it unlawful "[t]o refuse to * * * rent * * * or to refuse to negotiate for the * * * rental of, or otherwise make unavailable or deny, a dwelling to any person because of * * * familial status." 42 U.S.C. 3604(a). The FHA also prohibits "discriminat[ion] against any person in the terms, conditions, or privileges of * * * rental of a dwelling * * * because of familial status." 42 U.S.C. 3604(b). And the FHA makes it unlawful for any person engaged in the rental of a dwelling to make any "statement * * * with respect to the * * * rental of a dwelling that indicates any preference,

B20. Respondents answered the complaint on June 5, and a conciliation meeting with HUD officials was held on July 19, but was not successful. *Ibid.*

The HUD investigator completed his investigation on October 2, 1990. HUD issued a reasonable cause determination and charge of discrimination on March 2, 1992. Pet. App. B20. HUD's completion of its investigation and reasonable cause determination thereby exceeded the 100-day period following the filing of petitioner's complaint within which the Act requires HUD either to complete those tasks or to notify respondents of the reason for the delay.[4] *Id.* at C46.

2. HUD's charge alleged that respondents violated the FHA, 42 U.S.C. 3604, and various regulations promulgated thereunder. Pet. App. C35. Petitioner was granted permission to intervene and a HUD administrative law judge (ALJ) held a three-day hearing at the end of May 1992. *Id.* at B20. After a post-hearing briefing period, the ALJ issued an initial

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limitation or discrimination based on * * * familial status * * * or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. 3604(c).

"Familial status" is defined as "one or more individuals (who have not attained the age of 18 years) being domiciled with * * * a parent or another person having legal custody of such individual or individuals." 42 U.S.C. 3602(k)(1).

[4] The Act requires that, within 100 days of the filing of a complaint, HUD complete an investigation of an alleged fair housing violation and make a determination whether there is reasonable cause to believe such a violation occurred, "unless it is impracticable to do so." 42 U.S.C. 3610(a)(1)(B)(iv) and (g)(1). If HUD is unable to meet that deadline, HUD is supposed to notify the complainant and respondent in writing of the reasons for not doing so. 42 U.S.C. 3610(a)(1)(C) and (g)(1).

decision and order on August 26, 1992, which became the final order of the Secretary of HUD 30 days thereafter, pursuant to 42 U.S.C. 3612(h). Pet. App. C34-C86.

The ALJ found that respondent Michael P. Kelly, or agents under his direction and control, intentionally discriminated against petitioner because of her familial status, in violation of 42 U.S.C. 3604(a), and that their conduct violated 42 U.S.C. 3604(b) and (c). Pet. App. C54-C55. The ALJ concluded that respondent John T. Kelly was liable by virtue of his joint-ownership of the complex. *Id.* at C55-C56.

The ALJ rejected respondents' contention that the charge should be dismissed based on HUD's procedural missteps, including the fact that nearly two years elapsed between the date petitioner's complaint was filed and the date that HUD issued its charge of discrimination. The ALJ acknowledged that HUD had committed several procedural errors, including not notifying respondents that HUD would not be able to complete its investigation and determination of cause within the 100 days provided by statute. Pet. App. C60; but see *id.* at H145-H146. The ALJ found, however, that respondents were not substantially prejudiced in the preparation of their defense as a result. *Id.* at C60-C61.

The ALJ concluded that respondents were prejudiced with regard to damages because of HUD's delay in filing the charge of discrimination. Pet. App. C67-C68. The ALJ found that that fact did not constitute a legal basis for reducing the amount of damages owed petitioner, however, because "a search of the Act, its legislative history, and the cases * * * reveal[s] no authority for reducing the actual damages of a housing discrimination victim below the

proven amount because HUD has, without explanation, delayed presenting the case for adjudication." *Id.* at C68-C69. Therefore, the ALJ took HUD's delay into account instead when it considered HUD's request for civil penalties in the amount of $10,000. *Id.* at C75-C78. The ALJ explained that, under ordinary circumstances, he would have imposed a civil penalty less than $3,000, but he refused to impose any civil penalty in the instant case because the administrative delay increased the accrual period for the petitioner's damages and increased the amount of economic damages that respondents were ordered to pay. *Id.* at C76-C78.

The ALJ entered an injunction, ordering respondents to refrain from discriminating, to institute internal recordkeeping procedures, and to report to HUD for a specified period of time. Pet. App. C78-C83. The ALJ awarded Ms. Staples $10,430.76 in actual damages, $6,930.76 of which was for economic damages (compensating for the difference between the cost of respondents' apartment and the alternative housing petitioner obtained, the cost of finding that alternative, petitioner's increased transportation costs to work, increased commuting time, and time spent prosecuting her claim), and $3,500 was for intangible damages (emotional injury and loss of housing opportunity). *Id.* at C61-C66, C74. The ALJ refused to award damages for future losses because they were too speculative to be determined with reasonable specificity. *Id.* at C66-C67.

3. The court of appeals affirmed in part, vacated in part, and remanded for further proceedings. Pet. App. B17-B33. The court affirmed the ALJ's finding of unlawful discrimination and the injunction. *Id.* at B18. The court agreed, however, with respondents'

claim that they were denied the right to an objectively reasonable conciliation because the HUD investigator had participated in the conciliation process despite a HUD regulation that provides that, generally, agents should not take part in both the investigation and conciliation of the same case. 24 C.F.R. 103.300(c). Pet. App. B25-B32. The court therefore remanded the case to HUD so that the parties would "be given an opportunity to resolve this matter by means of a fair and reasonable conciliation effort." *Id.* at B32.

The court further ruled that, if conciliation failed, the matter was to be returned to the ALJ for further proceedings in light of the court's opinion. In addition, without elaboration, the court specified that "in no case should damages be assessed for the period during which HUD completely neglected this case." Pet. App. B32-B33. The court denied HUD's petition for rehearing. *Id.* at B17.

4. On remand, conciliation again failed and the matter was returned to the ALJ who, after further briefing, issued an initial decision which became the final order of the Secretary of HUD 30 days thereafter, pursuant to 42 U.S.C. 3612(h). Pet. App. D87-D108. The ALJ reconsidered the damages award in light of the court of appeals' decision. The ALJ rejected arguments by petitioner and HUD that he lacked authority to reduce the damages, noting that he was constrained to follow the court of appeals' decision. *Id.* at D90. Because the court of appeals did not identify a period "during which HUD completely neglected" the case, however, the ALJ ordered the parties to identify such a period or periods. *Id.* at D98. Respondents failed to identify any such period, arguing instead that HUD had completely neglected

the case from the day the complaint was filed. *Id.* at D99. The ALJ rejected that argument in light of HUD's investigation, attempt to conciliate, and reasonable cause determination, and ultimately concluded that, on the original record, he could not identify any specific period of complete neglect. *Ibid.* He declined to consider evidence submitted by HUD in support of its argument that it had, at no time, "completely neglected" the case. *Id.* at D99-D100. In order to comply with the court of appeals' order, the ALJ reduced the damages by the nominal amount of $1. See *id.* at D89, D91, D98-D101.

5. The court of appeals reversed the damages award. Pet. App. A1-A10. The court followed "the mandate of [the initial panel opinion] that a respondent in a housing discrimination case cannot be made to pay for the government's neglect," and concluded that the award for economic damages should have been based on an accrual period of one year (instead of 25 months) from the date of the incident. *Id.* at A5. The court explained that the "reasonable accrual period for damages in this case is twelve months: the period within which Congress intended HUD to carry out its administrative responsibilities and the standard term of a rental lease." *Ibid.* The court determined that petitioner's economic damages should be reduced to $3,571.03 based on its one-year limit. *Ibid.* In addition, the court reduced the amount of damages for emotional distress and loss of housing opportunity from $3,500 to $1,000 to account for the "period during which HUD mishandled the case," on

the basis that it "cannot ask the Kellys to pay for emotional distress caused by HUD." *Id.* at A6.[5]

In a dissenting opinion, Judge Ryan expressed his "strong disagreement" with the majority's reduction of the damages award to petitioner. Pet. App. A10-A16. He found "absolutely nothing in the record to support 'twelve months' as the appropriate period for the damage award," and noted that the majority did "not claim there is any record support for what it has done." *Id.* at A10-A11. He also noted that the parties, the ALJ, and the majority had not identified any period during which HUD completely neglected the case. *Id.* at A11. He concluded, therefore, that "[i]t is unjust in the extreme to penalize the victim, Staples, and reward the discriminators, the Kellys, because the majority is impatient with HUD." *Id.* at A11.[6]

DISCUSSION

We agree with petitioner that the court of appeals erred. The Secretary, United States Department of Housing and Urban Development (HUD), joined petitioner in seeking rehearing and in suggesting rehearing *en banc* in the court of appeals. HUD did not file a petition for a writ of certiorari, however, because the decision below appears to be the only

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[5] The court of appeals also affirmed the award of attorneys' fees to petitioner and reversed the denial of fees to respondents, ordering HUD to pay respondents $20,000 for fees and expenses. Pet. App. A6-A8, A10. Judge Ryan dissented from the order that HUD pay attorneys' fees to respondents. *Id.* at A11-A16.

[6] The court of appeals denied petitioner's and HUD's suggestions of rehearing en banc and the panel denied their petitions for rehearing, with Judge Ryan indicating that he would grant rehearing for the reasons stated in his dissent. Pet. App. E109-E110.

court of appeals decision to hold that HUD's delay can be used to deny full compensation to a victim of housing discrimination and, therefore, is an aberration that other courts of appeals are not likely to follow. Widespread application of the court of appeals' reasoning would, however, undermine substantially the remedial purposes of the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, to make victims of housing discrimination whole. Thus, if the Court were to grant review, HUD would support petitioner. Also, if other lower courts were to adopt the approach of the court below, we believe that review by the Court could be warranted at such time.

Respondents' conditional cross-petition does not, in any event, warrant review. The court of appeals correctly refused to order dismissal of the charges based on respondents' contention (Cross-Pet. 12-20) that procedural missteps by HUD eliminated HUD's jurisdiction.

1. The court of appeals erred in reducing the amount of damages awarded to petitioner based on delay by HUD. Its ruling is inconsistent with the Court's holding in *Curtis* v. *Loether*, 415 U.S. 189 (1974), that, with regard to awards of actual damages under the FHA, "[t]here is no * * * discretion [t]here: if a [FHA] plaintiff proves unlawful discrimination and actual damages, [s]he is entitled to judgment for that amount." *Id.* at 197. The Court emphasized that "[a] damages action under the statute sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach." *Id.* at 195; see also *id.* at 196-197 (contrasting legal right to damages under FHA with discretionary award of backpay under Title

VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*).

Nothing in the FHA permits the damages awarded to a victim of housing discrimination to be limited to one year from the date a complaint is filed or to any other amount that is less than the actual damages suffered. The FHA requires an ALJ who has found that a respondent has engaged in a discriminatory housing practice, to order appropriate relief, including actual damages suffered by the aggrieved person. 42 U.S.C. 3612(g)(3). The ALJ in the instant case adhered to that requirement. The court of appeals upheld the ALJ's finding of unlawful discrimination and did not set aside any of the ALJ's findings regarding the injuries actually incurred by petitioner upon which the ALJ's damages amount was based. The court of appeals, therefore, erred in reducing the ALJ's damages award.

2. The court of appeals' ruling is in tension with the decision of the Court in *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969). In that case, the Court made clear that a federal agency's delay in processing an injured person's claim does not justify reducing the compensatory award to that person. The Court held that a court of appeals may not, on account of delay (approximately four years) by the National Labor Relations Board (Board), reduce a backpay award that an employer has been ordered by the Board to pay to certain employees because of the employer's unfair labor practice. *Id.* at 259. The Court did not disturb the lower court's finding that the Board "had been guilty of 'inordinate' delay," in violation of the requirement that it "proceed with reasonable dispatch to conclude any matter presented to it." *Id.* at 262, 264 (citing former Section 6(a) of the Admin-

istrative Procedure Act, 5 U.S.C. 1005(a) (1964)). The Court assumed that the Board's delay violated that statutory mandate, but nonetheless concluded that the Board was "not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *Id.* at 265. In *NLRB* v. *International Ass'n of Bridge Ironworkers, Local 480*, 466 U.S. 720 (1984) (per curiam), the Court reaffirmed the now well-established principle of *Rutter-Rex Mfg. Co.* that the Board cannot "punish[] employees for the Board's nonfeasance." 466 U.S. at 725.

The same principle applies in the instant case. As in *Rutter-Rex Mfg. Co.*, the court of appeals found that the federal agency's delay violated a statutory mandate to act expeditiously. On that basis, the court of appeals decreased the amount of the award the agency had ordered the wrongdoer to pay to the victim of the unlawful conduct that prompted the agency review. But, the modification of the administrative award left the victim "worse off than [she] would have been but for" the unlawful conduct of the wrongdoer. See *Rutter-Rex Mfg. Co.*, 396 U.S. at 263. And, the modification undermined the purposes of the administrative award—"vindicat[ing] the public policy of the statute by making the [complainant] whole for losses suffered on account of" the conduct that violated the statute. See *ibid.* Therefore, proper resolution of the instant case would lead to a similar result here—reversal of the court of appeals' judgment and a ruling that petitioner is entitled to her full damages award. Cf. *Kraszewski* v. *State Farm Gen. Ins. Co.*, 912 F.2d 1182, 1186 (9th Cir. 1990) (applying *Rutter-Rex Mfg. Co.* principle in case under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

2000e *et seq.*, to preclude reduction of backpay awards because of court delay, noting that the remedial provisions of the NLRA and Title VII are analogous and have similar purposes), cert. denied, 499 U.S. 947 (1991); *United States* v. *Lee Way Motor Freight, Inc.*, 625 F.2d 918, 932-933 (10th Cir. 1979); see also Pet. 14.

3. The court of appeals' decision is inconsistent with the overall enforcement scheme of the FHA. Before 1988, victims of housing discrimination in violation of the FHA had to file private civil actions in order to vindicate their statutory rights. A gap in enforcement resulted because such private litigation proved to be too costly or time-consuming for many housing discrimination victims. In 1988, when Congress enacted the Fair Housing Amendments Act of 1988 (1988 Amendments), Pub. L. No. 100-430, 102 Stat. 1619, one of its central purposes was to create more effective remedies for violations of the Act by giving HUD a more active role in enforcement of the Act, including the authority to award actual damages to victims of discrimination, and by creating an administrative process through which victims could vindicate their statutory rights, instead of pursuing private litigation. See H.R. Rep. No. 711, 100th Cong., 2d Sess. 5-7, 13, 16-17 (1988); see also *HUD* v. *Blackwell*, 908 F.2d 864, 868-869 (11th Cir. 1990) (discussing 1988 enactment of administrative enforcement mechanism).

The court of appeals' decision, however, creates a disincentive to discrimination victims to rely on that administrative process and on HUD's authority to award damages. As petitioner points out (Pet. 20), if she had chosen to vindicate her rights through a private lawsuit instead of the administrative process, she would have had two years within which to bring

her civil action. 42 U.S.C. 3613(a)(1)(A) (two-years' statute of limitations). That limitations period would have been tolled during any period in which HUD had been investigating her complaint. 42 U.S.C. 3613(a)(1)(B). And, petitioner could have chosen to pursue a private lawsuit in lieu of an administrative adjudication up to the beginning of the hearing on the merits before the ALJ. 42 U.S.C. 3613(a)(3). Had petitioner filed a civil action, she would have been entitled, under *Curtis* v. *Loether*, *supra*, to a full award of actual damages. Instead, however, as a result of petitioner's having pursued relief through administrative channels, the court of appeals set an arbitrary one-year accrual period on petitioner's actual damages—an approach which threatens to erode the intended benefit and cost-effectiveness of the administrative process under the FHA, by placing the risk of budgetary constraints or other factors that might cause delay in the administrative process on the victim of discrimination who invokes that process.

Moreover, the one-year limit on accrual of actual damages established by the court of appeals conflicts with the period of time within which actual damages may accrue under the FHA's timeframe for a final administrative determination of damages. It is clear from that statutory timeframe that Congress contemplated that actual damages could accrue for longer than 12 months. A victim of discrimination may file a complaint with HUD up to one year after a discriminatory housing practice has occurred or terminated. 42 U.S.C. 3610(a)(1)(A)(i). HUD has 100 days to investigate and bring a charge, 42 U.S.C. 3610(a)(1)(B)(iv) and (g)(1), and longer, so long as it notifies the complainant and respondent in writing of

the reasons why it was unable to complete the investigation or make the probable cause determination within 100 days. 42 U.S.C. 3610(a)(1)(C) and (g)(1). The ALJ has a 120-day period following issuance of the charge within which to commence a hearing on the merits or, again, a longer period is permitted so long as the ALJ notifies the parties of the reason for the delay. 42 U.S.C. 3612(g)(1). Thus, the FHA, on its face, anticipates that significantly more than 12 months may elapse from the time the discriminatory housing practice occurred or terminated until the date of an administrative hearing. And the FHA clearly authorizes a longer period of time where the agency notifies the parties of the reasons for any delay, as HUD maintained it did here. See Pet. App. H145-H146. The court of appeals' decision limiting the accrual period for actual damages to 12 months from the date of the incident cannot be reconciled with this statutory scheme.[7]

4. Cross-petitioners contend (Cross-Pet. 12-20) that HUD completely neglected this case from the date the complaint was filed and therefore was divested of jurisdiction over the matter.

The court of appeals' refusal to order the charges dismissed on account of HUD's procedural missteps, which did not prejudice respondents' defense, is in accord with well-established principles and does not

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[7] The court of appeals' decision also raises the specter of a two-tiered system of justice that works to the detriment of complainants who need to rely on the federal administrative process because they cannot afford to bring an action in court. Cf. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 438-442 (1982) (opinion of Blackmun, J., joined by Brennan, Marshall, O'Connor, JJ.); *id.* at 443-444 (opinion of Powell, J., concurring in judgment, joined by Rehnquist, J.)

merit further review. The failure of an administrative agency to comply with procedural requirements, including statutory time limits, does not automatically eradicate its jurisdiction to enforce the statute. In *Brock* v. *Pierce County*, 476 U.S. 253, 259-260 (1986), the Court held that failure of the Secretary of Labor to issue a final determination as to the misuse of federal funds by a grant recipient did not preclude the Secretary from recovering the misused funds. In doing so, it relied on the "great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Id.* at 260 (quoting *United States* v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886)). The Court emphasized that statutory language mandating a federal agency to act within a certain time, does not, "standing alone, divest the Secretary of jurisdiction to act after that time." *Id.* at 266; see *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) ("if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanctions").[8]

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[8] *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980), does not suggest a different result. See Cross-Pet. 20. There the Court held that an action filed by a private plaintiff after the expiration of the 300-day time period specified in Section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), was time-barred. As this Court noted in *Pierce County*, 476 U.S. at 261, *Mohasco Corp.* involved the failure of an individual to comply with a statute of limitations that required only the filing of a complaint within a specified period. In contrast, the statutory time limitations in *Pierce County* and in this case require a

As in *Pierce County*, nothing in the present statute or its legislative history indicates that Congress intended to terminate HUD's jurisdiction if it failed to meet the statutory time schedule for administrative review. Indeed, the FHA indicates that Congress itself intended to monitor noncompliance with the statutory timeframe, and it does not suggest that noncompliance would elimi nate administrative jurisdiction. See 42 U.S.C. 3608(e)(2)(B)(i), (ii) and (iii) (requiring that HUD report to Congress, at least annually, identifying "the number of instances (and reasons therefor)" in which HUD did not complete investigations as required by Section 3610(a)(1)(B), did not make cause determinations within the time specified in Section 3610(g), and did not commence hearings or make findings and conclusions as required by Section 3612(g)).[9] Accordingly, the conditional cross-petition for a writ of certiorari should be denied.

5. Despite the court of appeals' errors, we did not file a petition for a writ of certiorari, as noted above, because the decision below appears to be an aberration that other courts are not likely to follow. Moreover, the decision below seems to be a departure from the court of appeals' own precedent, in which it has held that the purpose of the Fair Housing Act is to make

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federal agency to make a substantive legal determination about whether a particular set of facts, developed after investigation, establish a violation of the statute. As the *Pierce County* Court noted, "[t]his is a more substantial task than filing a complaint, and the Secretary's ability to complete it within 120 days is subject to factors beyond his control." *Ibid.*

[9] Cross-Petitioners also challenge (Cross-Pet. 20-21) the court of appeals' attorneys' fees determinations, but they do not suggest any reason justifying review by this Court.

whole the victims of discrimination, *United States* v. *City of Birmingham*, 727 F.2d 560, 566 (6th Cir.), cert. denied, 469 U.S. 821 (1984), and that a reviewing court should not deprive a victim of conduct in violation of federal law of her right to make-whole relief because of purported neglect by a federal administrative agency. *International Bhd. of Elec. Workers, Local 648* v. *NLRB*, 440 F.2d 1184, 1185 (6th Cir. 1971); *NLRB* v. *Seligman & Assoc., Inc.*, 808 F.2d 1155, 1161-1162 (6th Cir. 1986), cert. denied, 484 U.S. 1026 (1988). The absence of legal analysis and citation to applicable precedent[10] lends credence to the view of the dissenting judge below that the decision appears to have been triggered by concerns unique to this case (Pet. App. A10, A11) and therefore does not reflect a doctrinal shift in the law of the circuit.

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[10] Although the panel majority purported to anchor its decision in the Sixth Circuit's prior decision in *Baumgardner* v. *HUD*, 960 F.2d 572 (1992), the ruling below goes well beyond *Baumgardner*. Although the *Baumgardner* court stated that "HUD's delay and handling did have an adverse impact on the question of damages," *id.* at 580, it did not reduce any damages to the complainant on that basis. The *Baumgardner* court reduced the compensatory damages award because of lack of proof of economic loss to the complainant, *ibid.*, and, based on "the facts of th[at] case," the lack of necessity for an award of "presumed damages" for loss of civil rights, *id.* at 583. The perception of the court of appeals below that *Baumgardner* supported its decision to reduce petitioner's damages award may, in part, be attributable to the fact that the Court in *Baumgardner* erroneously referred to the civil penalty as a "civil penalty damage award." *Ibid.* See Pet. App. C77 n.26; *id.* at D96 (ALJ explaining confusion between damages and civil penalties underlying *Baumgardner*). The ALJ here eliminated the civil penalty, however, an action that more appropriately places the consequences of any delay on the entity that caused it.

Respectfully submitted.

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